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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1934

No. 696

ELTA KENWARD,
Petitioner,
vs.
The "ADMIRAL PEOPLES," her engines, boilers, apparel, etc.,
Defendant,
PORTLAND CALIFORNIA STEAMSHIP COMPANY,
Claimant and Appellee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

Appellee's Brief

STATEMENT OF FACTS

This is a proceeding in rem brought by appellant to charge a maritime lien on the defendant vessel because of an injury sustained by her on the Admiral Line dock in the City of Portland on the 15th

of May, 1932, as she disembarked from the defendant vessel on which she had taken passage from Wilmington, California, to Portland, Oregon. Her libel alleges that she was a passenger on the defendant vessel and that the vessel docked at a wharf in the Port of Portland on the 15th of May, 1932. The material portion of her libel for the purposes of this appeal is Article V thereof, which is as follows:

> "At the time and place aforesaid, respondent, its officers and agents, placed or caused to be placed a gang plank leading from one of the decks of said vessel to the wharf, and said gang plank sloped from the ship toward the wharf at an angle of from ten to fifteen degrees. The gang plank was approximately 2 feet in width and 18 feet in length, and was equipped with the usual rope railings which terminated approximately 3 feet from each end of the gang plank. The gang plank was so constructed that when put in place as aforesaid, the level of the plank at the shore end was about 6 inches above the level of the dock, thereby creating a step from the plank to the dock. After respondent's steamship had been docked and the gang plank placed as aforesaid, upon instructions from one of respondent's officers, libelant proceeded along said gang plank toward the dock, and as libelant reached the lower end of said gang plank, being then and there wholly unaware of the step between the lower end of the gang plank and the dock, and there being no warning furnished or given to libelant of the presence of said step, libelant fell from said gang plank and was violently and forcibly thrown forward upon the dock in such manner

as to cause the injuries hereinafter set forth. By reason of said fall, libelant sustained a fracture of the neck of the left femur and bruised, tore and injured the muscles, ligaments, tendons and nerves of her pelvic region and lumbar spine." (Record 2.)

The Portland California Steamship Company, owner of the Admiral Peoples, filed a claim and on the same day filed exceptions to the libel on the ground that the facts alleged in the libel are insufficient to constitute a cause of suit or action cognizable in admiralty or within the maritime jurisdiction of the court, and also on the ground that the facts alleged in the libel are insufficient to constitute a cause of action in rem against the defendant vessel and insufficient to entitle libelant to a maritime lien thereon. The exceptions were sustained by the District Court and thereupon a decree of dismissal was entered.

An appeal was taken to the Circuit Court of Appeals and the appeal was submitted in that court at the September term, 1934. Thereafter and on the 16th of October, 1934, the Circuit Court of Appeals, speaking through Judge Wilbur, handed down its opinion affirming the decree of the District Court. This opinion is found on pages 11-13 of the transcript of record.

We note at the top of the fourth page of peti-

tioner's petition for certiorari the following statement:

> "It is alleged in the libel it (the gang plank) was part of the vessel's equipment and used in the operation of the vessel."

We have carefully read the libel and find no such allegation therein.

Appellee contends that the cause is not one of cognizance in a court of admiralty and that the admiralty court has no jurisdiction to afford relief to petitioner.

Appellee also contends that the allegations of the libel fail to charge the Admiral Peoples, its owners and operators, with any negligence.

ARGUMENT

No Jurisdiction in Admiralty

The determination of the jurisdiction of admiralty must rest on the construction placed by the Court on the last two sentences in paragraph V of the libel which is found on page 2 of the record. These sentences are as follows:

> "After respondent's steamship had been docked and the gang plank placed as aforesaid, upon instructions from one of respondent's officers, libelant proceeded along said gang plank toward the dock, and as libelant reached the lower end of said gang plank, being then and there wholly unaware of the step between the lower end of the gang plank and the dock,

and there being no warning furnished or given to libelant of the presence of said step, libelant fell from said gang plank and was violently and forcibly thrown forward upon the dock in such manner as to cause the injuries hereinafter set forth. By reason of said fall, libelant sustained a fracture of the neck of the left femur and bruised, tore and injured the muscles, ligaments, tendons and nerves of her pelvic region and lumbar spine."

This case is free from the complications involved in two recent decisions rendered by this Court.

Smith & Son v. Taylor, 276 U. S. 179.

Vancouver Steamship Co. v. Rice, 288 U. S. 445.

In the former case the facts involved injury to a stevedore on the dock followed by his drowning in the water. In the latter case libelant's intestate was mortally injured on the ship and died a short time thereafter on the land. A tort was consummated in the first case on the dock and in the second case on the ship. The cause of action in the first case was therefore without and in the second case within the jurisdiction of admiralty.

In the case at bar petitioner sustained no injury while she was on the vessel or even while she was on the gang plank. She made the trip over the gang plank in safety and was injured only when she

stumbled at the shore end of the gang plank and fell on the dock. We call the Court's attention to the nature of her injuries as they are alleged in the last sentence of paragraph V of her libel:

> "By reason of said fall, libelant sustained a fracture of the neck of the left femur and bruised, tore and injured the muscles, ligaments, tendons and nerves of her pelvic region and lumbar spine."

These injuries, and all of them, were inflicted as she touched the dock after she had left the gang plank. No tort was committed in any view of the case until petitioner had reached the dock.

Dock Extension of Land

It is well established that the dock is an extension of the land and that an injury sustained on the dock is an injury sustained on the land and not on navigable water.

> *State Industrial Commission v. Nordenholt Corporation*, 259 U. S. 263, 66 L. ed. 933, 25 A. L. R. 1013, 1018.
>
> *Swayne & Hoyt, Inc. v. Barsch*, 226 Fed. 581, 588, 590 (C. C. A. 9).
>
> *The Mary Garrett*, 63 Fed. 1009, 1010 (Morrow, Northern Dist., Cal.).
>
> *Netherlands Co. v. Gallagher*, 282 Fed. 171, 176 (C. C. A. 2).

TORT NON-MARITIME IF CONSUMMATED ON LAND

We contend that no principle of law is better established than that admiralty has no jurisdiction of a proceeding to recover damages for a tort which is consummated not on navigable water but on the land.

The Plymouth, 3 Wall. 20, 18 L. ed. 125

In this case the vessel was berthed at a dock in the Chicago River. It was set on fire through the negligence of the Master and crew. The fire spread to the wharf and to buildings adjacent thereto. It was held by Mr. Justice Nelson that a libel in admiralty would not lie for the damage because the damage was consummated on land. This is the leading case on this branch of the law. It has been followed repeatedly by this Court and by a large number of decisions rendered in district courts and in the circuit courts of appeals.

Cleveland Terminal Co. v. Cleveland Steamship Co., 208 U. S. 316, 52 L. Ed. 508, 511-512

It was charged that the William E. Reis, the defendant vessel, had inflicted injuries on a railroad bridge and dock and a libel in rem was filed for the purpose of recovering damages therefor. The Supreme Court, speaking through Mr. Chief Justice Fuller, said:

"In The Plymouth (Hough v. Western Transp. Co.), 3 Wall. 20, 18 L. ed. 125, Mr. Justice Nelson, delivering the opinion of the court, said that the true meaning of the rule of locality in cases of maritime torts was that the wrong must have been committed wholly on navigable waters, or, at least, the substance and consummation of the same must have taken place upon those waters, to be within the admiralty jurisdiction. A substantial cause of action arising out of the wrong must be complete within the locality on which the jurisdiction depended. * *

"The rule stated has been accepted generally by bench and bar, and has never been overruled. * * *.

"The proposition contended for is that the jurisdiction of the admiralty court should be extended to 'any claim for damages by any ship,' according to the English statute; but we are not inclined to disturb the rule that has been settled for so many years, because of some supposed convenience."

In recent years many disputes have arisen with reference to the operation of workmen's compensation laws adopted by the different states and applicable to industrial injuries. Litigation growing out of these controversies has repeatedly come before this Court and this Court has consistently held that the state statutes are applicable to injuries sustained on the land or on the dock but that they are not applicable to injuries sustained on a vessel afloat in navigable water. The decisions emphasize the manifest intention of the framers of the Con-

stitution that the law applicable to matters of admiralty cognizance shall be uniform throughout the United States. If workmen's compensation laws enacted by the different states should determine the rights of workmen who are injured on navigable water, this purpose of the framers of the Constitution would be circumvented. The decisions of this Court on this subject, unless it is the desire of this Court to overrule them, are, we submit, determinative of the question presented in the case at bar. We call the Court's attention to five of these recent cases.

State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 66 L. ed. 933, 25 A. L. R. 1013, 1014-1015, 1016, 1018

> "Sebastiana Insana, mother of Guiseppe Insana, asked of the New York State Industrial Commission an allowance under the Workmen's Compensation Law on account of her son's death, which she claimed resulted from accidental injuries received May 15, 1918, in the course of his employment as a longshoreman by the Nordenholt Corporation, then unloading a vessel lying in navigable waters at Brooklyn. The cargo consisted of bags of cement. These were hoisted to the dock, and there tiered up by Insana and other longshoremen. While thus engaged, he slipped and fell on the dock.
>
> "The commission found 'the accidental injuries which the said deceased sustained while

working for his employer when he fell from the pile of bags to the floor were the activating cause of his death, and his death was a direct result of the injuries sustained by him while engaged in the regular course of his employment,' and awarded compensation as specified by the statute."

"When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

"The injuries out of which Southern P. Co. v. Jensen arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the Workmen's Compensation Statute of the state, and this court held they could not."

"Insana was injured upon the dock, an extension of the land (Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 52 L. Ed. 508, 28 Sup. Ct. Rep. 414, 13 Ann. Cas. 1215), and certainly, prior to the Workmen's Compensation Act, the employer's liability for damages would have depended upon

the common law and the state statutes. Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law."

Nogueira v. New York, New Haven & H. R. Co., 281 U. S. 128, 74 L. ed. 754, 756-757, 758

"The petitioner was injured on a car float of five hundred tons belonging to the defendant railroad company. The float was a vessel used in the transportation of railroad cars and at the time of the injury was lying in navigable waters at pier 42, East River, New York harbor. The petitioner was employed by the railroad company as one of a gang of freight handlers in loading freight into cars on the float. He was using a hand truck in carrying a bale of paper, a piece of interstate freight, and, as the float was several feet lower than the dock, it was necessary to move the bale over a plank which ran from the dock to the middle of the float at a steep incline. Several men were assigned to help the petitioner in order to control the movement of the bale by handhooks. The petitioner was in front of the truck holding its handles and alleged that by the negligence of the other men, who failed to hold the bale properly, it got out of control and skidded down the plank, throwing the petitioner on the floor of the float and crushing his leg."

"In State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 66 L. ed. 933, 25 A. L. R. 1013, 42 Sup. Ct. Rep. 473, 21 N. C. C. A. 862, a longshoreman was injured on a dock while engaged in unloading a vessel. It was decided that in such a case, where the injury took place

on an extension of the land, the maritime law did not prescribe the liability and the local law had always governed. The Workmen's Compensation Law of the State was accordingly held to be applicable. The distinction was thus maintained between injuries on land and those which were suffered by persons engaged in maritime employment on a vessel in navigable waters.

"From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship. A car float in navigable waters is subject to the maritime law like any other vessel."

Employers' Liability Corp. v. Cook, 281 U. S. 233, 74 L. Ed. 823

In this case the court held that a workman injured in the hold of a vessel is without the protection of the workmen's compensation act of the state in which he resides and in which his employer does business.

Smith & Son v. Taylor, 276 U. S. 179, 181-182, 72 L. Ed. 520

The above case came before this Court on writ of certiorari directed to a Louisiana court which had held the Louisiana Workmen's Compensation Law applicable to an injury sustained by plaintiff's

intestate while working upon a stage that rested solely upon the wharf and projected a few feet over the water to or near the side of the vessel. The opinion was rendered by Mr. Justice Butler and we quote from it the following sentences:

> "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated sec. 2 of art. 3. But, if the cause of action arose upon the land, the state law is applicable. * * * The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land. It was the sole, immediate and proximate cause of his death."

Vancouver Steamship Co. v. Rice, 288 U. S. 445, 77 L. Ed. 885

Libelant's intestate in the above case was mortally injured on board a ship lying in the Columbia River at Westport, Oregon. The facts are set forth in the following sentences of the opinion of this Court rendered by Mr. Justice Butler:

> "While upon the deck of the ship helping in that work he was struck by a falling sling-load of lumber and mortally injured. He was taken ashore where he died an hour later."

On page 448 of the official report the opinion proceeds as follows:

> "The substance and consummation of the occurrence which resulted in intestate's death and so gave rise to respondent's cause of action took place on the deck of the ship lying in navigable waters. * * * The foundation of the right to recover is a wrongful act or omission taking effect aboard the ship and resulting in death upon the land. This is a maritime tort, and upon it the respondent's claim rests. The admiralty court has jurisdiction."

The overwhelming weight of authority in the different circuit courts of appeals and in the Federal courts of original jurisdiction is in accord with the rule announced in *The Plymouth* and the other decisions of the Supreme Court which we have cited.

Swayne & Hoyt, Inc. v. Barsch, 226 Fed. 581, 588, 599 (C. C. A. 9)

> "The decision in Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, cited by the defendant, is not authority for the proposition that there would have been jurisdiction in admiralty. What was decided in that case was that admiralty had jurisdiction of a suit in personam to recover for injuries sustained by

an employee who is engaged in loading a vessel at a dock in navigable waters, the employee having been injured while at work on the vessel. The court reaffirmed the general principle 'that the test of admiralty jurisdiction in tort in this country is locality.' The opinion cites and leaves undisturbed a long line of decisions made both before and since the decision in The Plymouth, 3 Wall. 20, 18 L. Ed. 125, that where the tort is committed, not on the vessel, but on the shore or on a dock, or where it is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the place of the damage, and not by the place of the origin of the tort. Some of the cases cited are included in the following: The Mary Stewart (D. C.), 10 Fed. 137; The Ottawa, 1 Brown's Adm. 356, Fed. Cas. No. 10,616; The Mary Garrett (D. C.), 63 Fed. 1009; The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; Bain v. Sandusky Transportation Co. (D. C.), 60 Fed. 912; The Albion (D. C.), 123 Fed. 189; The Bee (D. C.), 216 Fed. 709; The H. S. Pickands (D. C.), 42 Fed. 239; Hermann v. Port Blakely Mill Co. (D. C.), 69 Fed. 646; Cleveland Terminal R. R. v. Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215; Martin v. West, 222 U. S. 191, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592. * * *

"In the present case there could have been no jurisdiction in admiralty for the reason that the plaintiff was injured while working on a dock. The rule, declared in The Plymouth, supra, has ever since been followed that jurisdiction of torts in admiralty depends upon locality; that where the cause of action is completed on navigable waters, admiralty has jurisdiction, but where it is completed on land, the remedy belongs to the courts of common law."

The H. S. Pickands, 42 Fed. 239, 240

The facts in this case are closely akin to those in the case at bar. The essential facts are stated in the following two sentences copied from the opinion:

> "In attempting to go on shore to procure other material to use in his work, libelant mounted the ladder, which slipped at the bottom, owing to the icy condition of the wharf, throwing libelant down upon the wharf, fracturing two of his ribs, and otherwise injuring him severely. This libel was filed to recover for his pain and suffering, his medical attendance, and his loss of time."

The court said:

> "I am clear in my opinion that a court of admiralty has no jurisdiction of this case. It has never been doubted since the case of The Plymouth, 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule. Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. Rep. 25; The Neil Cochran, Brown, Adm. 162; The Ottawa, Id. 356; The C. Accame, 20 Fed. Rep. 643; The Maud Webster, 8 Ben. 547."

The Albion, 123 Fed. 189

This was a proceeding had in the Western District of Washington, Judge Hanford writing the

opinion. Libelant fell and was injured as he attempted to board the defendant vessel. He charged negligence in the removal of the gang plank. The court said:

> "If the case is founded upon the alleged tort, no suit in admiralty can be maintained, because the jurisdiction of admiralty extends only to torts committed afloat on navigable water. Wharfs and structures connected with the solid earth are not maritime vessels, and injuries suffered thereon do not constitute maritime torts cognizable in a court of admiralty, even though the cause of the injury may have originated on board of a vessel moored alongside or in near proximity."

The Mary Garrett, 63 Fed. 1009, 1010-1011

This is a decision rendered by Judge Morrow sitting in the District Court for the Northern District of California. A libel in rem had been brought to recover for personal injuries sustained by libelant in the discharge of cargo from the defendant vessel. By reason of the negligence of the operators of the vessel libelant contended that a part of the cargo fell upon him while on the dock at which the vessel was discharging cargo. Judge Morrow said:

> "While the language employed in the amended libel does not clearly, and in so many

words, state that libelant received the injury on the wharf, yet the reasonable interpretation of the language used in narrating the manner in which the injury was sustained is hardly susceptible of a different conclusion. In fact, it was conceded at the argument that libelant was injured on the wharf. That a wharf is, figuratively speaking, regarded, in the admiralty, as land, and not as water, is well settled. It is deemed but an improvement or extension of the shore for commercial purposes. The Rock Island Bridge, 6 Wall. 213; The Ottawa, 1 Brown's Adm. 356, Fed. Cas. No. 10,616; The Empire State, 1 Newb. 541, Fed. Cas. No. 12,145; The Mary Stewart, 10 Fed. 137. The proposition is elementary in the admiralty law that the test of the jurisdiction of admiralty courts over torts is the locality of the injury. The question which is conclusive upon the jurisdiction of this court as a court of admiralty is, where was the injury sustained? On land or on water? If upon the land, then the admiralty cannot take cognizance of the tort; if upon the 'water,' this term comprehending in this country the high seas and navigable waters, this court has exclusive original jurisdiction of an action in rem for damages. Henry, in his work on Admiralty Jurisdiction, etc. (page 68, Sec. 26), thus states the general proposition:

"'This jurisdiction, as far as it concerns torts, depends entirely upon the locality; but it must be committed on the water, and not on the land.'

"The authorities all affirm the same principle in unequivocal terms."

Netherlands Co. v. Gallagher, 282 Fed. 171, 176 (C. C. A. 2)

This is a decision by Judge Rogers. It distinctly holds that the wharf is an extension of the land. Libelant was a stevedore who was injured while working on the wharf. The court held that admiralty had no jurisdiction and that the workmen's compensation law of the state was applicable.

The rule announced by the foregoing authorities is also recognized by the standard textbook on the subject.

1 Benedict on Admiralty, Sec. 127

> "Cases of tort on the high seas, super altum mare, have always been held to be within the jurisdiction of the admiralty. That jurisdiction, in such cases, depends upon locality and embraces torts and injuries done upon the sea or on public navigable waters. It depends upon the place where the cause of action arises and that place must be the waters which are subject to the admiralty jurisdiction. As in contract cases the jurisdiction rests upon the maritime nature of the subject-matter, so in cases of tort it rests upon the maritime character of the locality. Conversion, if committed on navigable waters, is a tort of which admiralty has jurisdiction. Every species of tort, however occurring and whether on board a vessel or not, upon the high seas or navigable water, the Supreme Court has said, is of admiralty cognizance."

We also request careful consideration by the Court of the opinion of Circuit Judge Wilbur found on pages 11-13 of the record herein. It is apparent that the Circuit Judges for the Ninth Judicial Circuit are of the opinion that this Court has repeatedly and quite recently announced the rule with reference to the jurisdiction of the admiralty courts for which appellee contends in the case at bar. We are of the opinion that the bar and the business world concerned with shipping by sea are of the opinion that the law is well settled to the effect that a tort consummated on the dock or on the land is without the admiralty jurisdiction. We think that if there is occasion for a change of the law in this respect the change should be brought about by Act of Congress and not otherwise.

Petitioner's Authorities

We have not been served with petitioner's brief at the time when this brief is prepared. We assume that the authorities relied upon will be chiefly those cited in the petition for certiorari and in the briefs filed by petitioner in the District Court and in the Circuit Court of Appeals. These cases are as follows:

The Atna, 297 Fed. 673, 675-676

This is a decision of Judge Cushman. The libel was filed to recover for personal injuries sustained by a stevedore who had been working on the defendant vessel in Grays Harbor. When libelant finished his work he left the vessel by a wooden ladder. The ladder was in defective condition and broke while libelant and other stevedores were on it. Libelant clung to a portion of the ladder after the break. The ladder fell on one of the fender logs which was floating on the water, rising and falling with the tide. The fender log was an aid to navigation and was placed by the side of the dock as a protection to ocean-going vessels when approaching the dock. Although the ladder fell upon the fender log, libelant himself fell into the water. Judge Cushman held that admiralty had jurisdiction.

The facts in the above case are widely distinguishable from the facts in our case. The tort in Judge Cushman's case was consummated on navigable water. The tort, if any, in the case at bar was consummated on the dock.

Judge Cushman has something to say in his opinion about the jurisdiction of admiralty continuing when one is leaving the vessel until he reaches the dock, and vice versa that the jurisdiction of admiralty does not attach in the case of one

leaving the dock until he reaches the vessel. This statement of Judge Cushman has been followed, we think, by only one other District Court case. The principle announced by him is certainly out of harmony with the line of authority above cited by us and it is certainly out of harmony with the most recent decision of the Supreme Court which we have been able to find.

Nogueira v. New York, New Haven Co., 281 U. S. 128, 74 L. Ed. 754

Petitioner in this case was injured after he had left the dock but before he had finished his journey onto the float. He was thrown by the accident onto the floor of the float and his injuries were sustained on navigable water. The court held that the case was within admiralty cognizance and that the New York Workmen's Compensation Act was therefore not applicable.

Egan v. Morse Drydock Co., 212 N. Y. Supp. 56

Plaintiff in this case was ascending a ladder from a pier to the deck of a vessel. The ladder was not properly fastened. It slid along the rail and plaintiff fell on the dock. The court held that ad-

miralty had no jurisdiction. The decision is in entire conformity with the contention made by claimant. On page 59 of the report the court said:

> "It would not make any difference whether the tort had its inception upon water if the consequential effect of the wrong, the consummation of the tort, happened on the land."

The Aurora, 178 Fed. 587, 590

This was a decision handed down by Judge Wolverton in the District Court for Oregon. A longshoreman, in going from the dock to the vessel, fell from the plank provided by the vessel. He fell on the vessel and was killed. Judge Wolverton held that admiralty had jurisdiction. It will be noted that Judge Wolverton's decision is in harmony with the principle expressed by the court in *Egan v. Morse Drydock Co.*, supra. Judge Wolverton's opinion is out of harmony with Judge Cushman's views as expressed in *The Atna*, 297 Fed. 673, 675-676.

The Aurora was appealed to the Circuit Court of Appeals and the decision of that court is found in 191 Fed. 960. The decree was affirmed, but we find in the opinion no discussion of the jurisdictional

question which makes Judge Wolverton's opinion in point in the case at bar.

Hermann v. Port Blakely Co., 69 Fed. 646

This is a decision by Judge Morrow sitting in the District Court for the Northern District of California. Libelant was a mate on the "Kate Davenport." The vessel was loading lumber. The lumber was permitted to slide down a chute into the hold. The libelant charged that the manner in which the lumber was transferred from the dock to the hold was negligent and that he sustained injuries thereby. The negligence relied on took place on the dock but libelant was injured on the vessel. Judge Morrow reviews the jurisdictional question with some thoroughness. We quote from his opinion:

> "Taking these exceptions up in their order, it was urged upon the argument that the court has no jurisdiction of the tort alleged, for the reason that it originated on land,—that is to say, on the wharf from which the lumber was being loaded,—and not on the water; that, to give a court of admiralty jurisdiction over torts, not only the injury must take place on water, but the whole tort, from its incipiency to its conclusion, must occur on the water; and that where the tort has its origin on land, although it is consummated and the injury sustained, on water, a court of admiralty can have no jurisdiction of the wrong. 'It has been uniformly

held * * * that the American admiralty has a general maritime jurisdiction, embracing all maritime causes of action, as well matters of contract as matters of tort; that in matters of tort the jurisdiction depends upon the locality, and embraces all damages and injuries upon the sea.' Ben. Adm. Sec. 261, p. 149 (2d Ed.). To the same effect are the following cases: The Plymouth, 3 Wall. 20; The Rock Island Bridge, 6 Wall. 213; The Neil Cochran, 1 Brown, Adm. 162, Fed. Cas. No. 10,087; The Ottawa, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; The Mary Stewart, 10 Fed. 137; The Arkansas, 17 Fed. 383; The Professor Morse, 23 Fed. 803; The H. S. Pickands, 42 Fed. 239; The John C. Sweeney, 55 Fed. 540; The Mary Garrett, 63 Fed. 1009. ***

"Applying this reasoning to the case at bar, —although the facts alleged in the libel present a counter proposition to that involved in The Plymouth, in this, that in the latter case the origin of the tort was on water, while in the case at bar it is alleged to have been on land,— it would seem to be strong argument in favor of the jurisdiction of the court. For, if it is the locality where the substance and consummation of the tort happened which is the ultimate test of admiralty jurisdiction, and not the origin, the case at bar clearly comes within the rule. What the learned justice says, in the concluding sentence of the paragraph just quoted, about the cause of action not being 'complete on navigable waters,' has reference, plainly, from a reading of the whole opinion, to the 'substance and consummation of the tort'; that is to say, the locality where the injury is inflicted, and the damage sustained. This latter must be upon the high seas, or the navigable waters, in order to be within the admiralty jurisdiction.

"The Maud Webster, 8 Ben. 547, was a case where a libel in rem had been filed against the schooner for injuries sustained to a derrick and other articles belonging to the libelant by reason of a collision between the schooner and the derrick. * * * The learned judge said:

" 'In this case, the schooner which did the injury to Howell's property was on the water, was afloat and engaged in navigation; but Howell's property was a part of the soil of the earth, or was affixed to it, and was wholly on land. In a case of tort, there can be no jurisdiction in the admiralty unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters.'

"In commenting on the case of The Ottawa, 1 Brown, Adm. 356, Fed. Cas. No. 10,616, as authority for his decision, Judge Blatchford says, further:

" 'Although the criterion of admiralty jurisdiction in cases of tort is locality, yet, as was correctly remarked in that case, the place or locality of the injury is the place or locality of the thing injured, and not of the agent by which the injury is done.' * * *

"The central idea found running through all these cases is, so far as jurisdiction over torts is concerned, that the admiralty law looks to the place where the injury was suffered, and not to the locality of the agent causing the injury."

The foregoing authority is in entire accord with the contentions of appellee.

Fireman's Fund v. Monterey, 6 F. (2d) 893, 895

This was a decision in the District Court for the Northern District of California, Judge Kerrigan writing the opinion. A libel in admiralty was filed to recover the value of canned sardines which were precipitated into the waters of Monterey Bay by the alleged negligence of those operating the defendant vessel. The court said:

> "Libelants are assignees of the shippers of a large number of cases of canned sardines, which were lost or damaged when a wharf, owned and operated for commercial purposes by respondent, collapsed and precipitated said cases into the navigable waters of Monterey Bay. * * *
>
> "The general rule is that 'the test of jurisdiction in matters of tort is the locality.' Hughes, Admiralty (2d Ed.), Sec. 96. Here it is admitted that all the acts and omissions of respondent took place on land, since the wharf in relation to which they occurred is considered in law as land. Hughes (2d Ed.), Sec. 198, and cases cited; The Plymouth, 70 U. S. (3 Wall.) 20, 18 L. Ed. 125. But, as no actual damage to the goods was inflicted until they were thrown or fell into the water, it is asserted that the locality of the injury is the Bay of Monterey, which admittedly is within the jurisdiction of a court of admiralty. * * *
>
> "As stated in Ex parte Phenix Ins. Co., 18 U. S. 610, 618, 7 S. Ct. 26, 28 (30 L. Ed. 274): 'The substantial cause of action, arising out of the wrong, must be complete within the locality on which the jurisdiction depended.' This merely paraphrases the holding of Mr. Justice

Nelson in The Plymouth, supra. Both decisions are referred to as authoritative in Johnson v. Chicago & P. Elevator Co., supra, and similar language is used there. As lately as 1915, the Circuit Court of Appeals of the Ninth Circuit, in Swayne & Hoyt, Inc., v. Barsch, 226 F. 581, 588, 141 C. C. A. 337, after collecting the cases upon the subject, quoted the holding of The Plymouth as unimpaired by subsequent decisions. * * *

"When the wharf collapsed, with the result that the goods stored on it fell into navigable waters, the injury then occurred, but only after contact with and immersion in such waters.

"Jurisdiction of a court of admiralty therefore exists, and the exceptions to these libels must be overruled."

The Hokkai Maru, 260 Fed. 569 (C. C. A. 9)

In this case a Jacob's-ladder was hanging loosely down the side of the ship to a point three or four feet from the dock. Libelant got on the ladder but failed in his effort to climb it and reach the rail of the ship. He fell into the water. He charged that the defendant vessel was negligent in that the ladder was greasy and not a proper facility to be furnished to an employee in reaching the vessel from the dock. The Circuit Court of Appeals speaking through Judge Ross held that admiralty had juris-

diction. This case also is in entire accord with the contentions of appellee.

Facts Do Not Constitute Negligence

Appellee has at all times believed and contended that the facts alleged in the libel do not make out a case of negligence on the part of the owners and operators of the Admiral Peoples.

The fifth paragraph of the libel which we have already quoted and which is found on page two of the record, alleges that the gang plank on which libelant disembarked from the Admiral Peoples was so constructed that at the shore end, the gang plank was about six inches above the level of the dock, thereby creating a step from the plank to the dock.

The accident took place on the 15th of May, 1932 (see paragraph four of the libel, page two of the record). It does not appear at what hour of the day the accident occurred, but there is no charge that there was any defect in the lighting of the premises. The charges of negligence are contained in paragraph six, pages two to three of the record. They are as follows:

> "Libelant's injuries were caused solely by the carelessness, recklessness and negligence of the respondent, her officers and agents, in the following particulars:
>
> 1. Respondent, her officers and agents, failed and neglected to furnish and maintain for libelant's use a gang plank which at the shore end would be flush with the dock or taper off to the level of the dock.

2. Respondent, its officers and agents, furnished for libelant's use a gang plank which at its shore end had a step which was dangerous to the life and limb of passengers using said gang plank and particularly dangerous to the life and limb of libelant.

3. Respondent, its officers and agents, failed and neglected to furnish and maintain for libelant's use a hand-rope or railing extending along either side of said gang plank to the shore end thereof.

4. Respondent, its officers and agents, failed and neglected to post and maintain at the shore end of said gang plank a sign or warning notice of said step.

5. Respondent, its officers and agents, failed and neglected at said time and place to maintain a man at said step for the purpose of warning libelant of said step and for the purpose of assisting libelant to step from said gang plank to the dock."

There are many cases to be found in the books wherein the courts have held that it is not negligence to maintain a step approximately six inches in height up or down which foot passengers are obliged to travel. We call the Court's attention to the following line of authority:

Morgan v. City of Lewiston, 91 Me. 566, 40 Atl. 545, 546-547

"Was this particular place, taking into account its location and all surrounding circum-

stances, reasonably safe for persons having occasion to pass over it, who upon their part were in the exercise of due care? We think it was. These sidewalks were upon different streets. In our opinion, it would be unreasonable and impracticable to require of cities and towns that they should so construct all of their sidewalks that, at junctions of rectangular streets, the sidewalks should meet upon exactly the same level.

"The difference in level here complained of was not so much as ordinarily exists between a sidewalk and a street crossing. True, it is said that this would be expected in the latter case, but we think that a person in the exercise of due care, who was unacquainted with the locality, ought to anticipate that, at the junction of two sidewalks, in a place such as was this, there might be exactly such a condition as is here complained of.

"In Witham v. Portland, 72 Me. 539, this court held as a matter of law, after a jury had found the other way, that a depression in the sidewalk of the defendant city 6½ inches below the surface of the walk, and 8½ inches in width from a basement window, about one-half of which was within the limits of the walk, was not a defect,—a much stronger case for the plaintiff, we think, than this."

Shippey v. Village of Au Sable, 65 Mich. 494, 32 N. W. 741, 742, 743

"The point in question was on the transition line from the part confined to foot-passengers to the part used by vehicles; and the contention so far as it related to negligence in maintaining

the passage in this condition, turned on the supposed duty of defendant to keep sidewalks and cross-walks on the same level where they join, or throughout. No other defect is alleged, and the accident was due to this, and to nothing else connected with the place and its surroundings, so far as alleged or appearing. * * *

"The practice is general, if not universal, of having a sharp fall at the curb along the line of the sidewalk space which defines the division between sidewalk and street. There is usually a similar drop at street crossings for surface drainage, which would require the upper walk and the street crossing, if made continuous, to be made so by bridging. There is no authority that we are aware of which prevents such a step from being made and maintained. It is among the commonest things found in cities and villages. The gutters parallel with sidewalks, and generally bordering them, are never covered throughout, and all persons passing into the street, except at a corner crossing, must step down to reach it. The danger of falling would be the same whether at a crossing or elsewhere; and, whatever might be expected of grown persons, small children left to themselves would be quite as likely to stray off to the one place as to the other."

City of Chicago v. Bixby, 84 Ill. 82, 25 Am. Rep. 429, 430, 431

"Appellee, in passing along Green street, in the city of Chicago, slipped and fell, and broke her leg. She thereupon sued the city to recover damages for the injury, charging negligence on the part of the city in constructing the walk at the place of the accident. At the place where

appellee fell, a portion of the walk was up to grade, and a portion ten or twelve inches below grade, and to enable persons to pass conveniently, a step had been placed at the intersection of the two walks, about six or seven inches wide and two inches thick, extending the entire width of the sidewalk, and it was sound and firmly fastened. It seems there was ice on the walk, and it was very slippery at the time. Appellee was descending from the upper to the lower walk, and was on the step when she fell and sustained the injury."

"After such an accident, it is natural for persons then to conclude it was not safe. But it is the fact of the injury having occurred, that suggests the idea of want of proper construction. It is more than probable, that immediately before this occurrence the same witnesses would have said this step was safe, and would have referred to the great length of time it had been used, and the large number of persons who had passed over it without accident, as strong evidence of the fact."

"We think the evidence shows that the sidewalk was reasonably safe, and, if so, the city should not be held liable."

Miller v. City of St. Paul, 38 Minn. 134, 36 N. W. 271, 272

"Along the graded part of Decatur street a sidewalk had been built, which was some 14 inches higher than the natural surface of the ground at the crossing of Preble and Decatur. A step had been constructed at the end of the walk, about half way between the walk and the ground; the distance from the walk to the step,

and from the step to the ground, being each from six and one-half to seven inches. * * *

"The existence of a step at this place, if in proper repair, would be no defect, so as to render the city liable for accidents to pedestrians stepping from the sidewalk onto the street crossing. In any city, and especially in one growing rapidly, where the streets and sidewalks can not all be put at once on a uniform grade, it may and often must happen that the manner of constructing a sidewalk must be controlled by the necessities of the situation. A step or steps from the walk to the street crossing may, on the whole, be the most suitable plan of which the case will admit."

Gilliland v. City of Omaha, 89 Neb. 668, 131 N. W. 1055, 1056

"The question presented is whether the city is in any event liable for damages to a foot passenger merely because there is a slight difference in level between a crosswalk and sidewalk, and the surface of the crosswalk is wet and slippery from recent rain. It would be imposing an unwarranted burden upon the city to require that all crosswalks and sidewalks for foot passengers should be constructed either upon a level or upon a uniform slope and without steps at the points where they intersect each other or reach the level of the driveway. Moreover, if the court should hold that a difference of eight to ten inches in passing from a crosswalk to a sidewalk off from the level of a paved street to the edge of the curb constituted such a negligent manner of construction that the city would be liable for damages every time a person slipped in stepping up or down, this

would certainly be laying an extraordinary and unjust tax upon the inhabitants of the city."

Teager v. City of Flemingsburg, 109 Ky. 746, 60 S. W. 718, 719

"The circuit court having, at the close of plaintiff's evidence, given a peremptory instruction in favor of the city, we are brought to consider whether the building a sidewalk with a step, which, from the nature of the grade, the city government deemed necessary and proper, is of itself such negligence as will warrant a recovery by one injured in a fall caused by the step. * * * It may frequently be, and we know it is sometimes, necessary to break the angle of sidewalk grades by steps. The determination of the necessity and the plan should be left to the discretion of the governing or legislative body of the city, subject to control in cases of such manifest error or mistake as would indicate a failure to consider or a purpose to misconstruct the work. The ruling of the lower court in giving the peremptory instruction being in accord with these views, the judgment is affirmed."

Clark v. Chicago, 4 Biss. 486, Fed. Cas. No. 2817

"The plaintiff on the morning of the 6th of February, 1886, was walking along the street at the corner of Randolph and Wells Streets. Stepping upon what is called an apron, which, it is alleged, had some ice upon it, he slipped, fell and broke his leg * * * For the injury resulting from this fall, and in consequence of alleged negligence on the party of the city, this action is brought. * * *

"The first question is one of law and of fact, and which the jury, under the direction of the court, is to decide. This apron, as it appears, consists of boards or planks, constructed for the purpose of enabling passengers to pass over the space where the water flows down to the sewer and is carried off. This particular apron was not even with the sidewalk in passing across Wells street from the west sidewalk to the roadway of the street, but there was a descent or a step from the sidewalk down to the apron, and in stepping from the sidewalk to the apron the plaintiff slipped and fell.

"In determining this question, of course we have to look to the nature and object of the apron, and the mode and manner of its construction. * * *

"In a city like this it cannot be said that the mere fact that there is a descent or a step from a higher to a lower elevation of the street or sidewalk constitutes a defect of such a character as to render the city liable for any accident which a passenger may meet with in stepping from one level to another. In properly grading the streets, it is impossible that there should be a smooth, level walk in all places. Therefore, it is not, I think, such a fault or defect as to make the city liable simply because there was a step from a higher to a lower level."

The foregoing authorities are particularly relevant to the first two charges of negligence contained in article six of the libel, but they inferentially bear on the other three charges. If a foot passenger must expect to encounter a step six inches, or thereabouts

in height, certainly there can be no duty to warn as to the existence of such a step, nor can there be any duty to maintain a railing by the side of such a step.

We contend that negligence cannot be predicated on the failure of a carrier to bring a gang plank flush with the dock, where the step from the gang plank to the dock is as short a distance as six inches. It is not alleged that rain was falling. The Court will know judicially that there could be no snow or ice in the climate of Portland, Oregon, on the 15th of May. There is no charge that the vessel arrived after dark and that the dock was insufficiently lighted. Libelant must allege her cause of action and, in the absence of allegations, the Court will not presume that the conditions were out of the ordinary in any respect.

We think on careful examination of the record in this cause the Court will find no error.

Respectfully submitted,

W. LAIR THOMPSON,
WALLACE MCCAMANT,
Proctors for Claimant.